84-616

IN THE

Supreme Court of the United States

No.

October Term, 1984

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,

Petitioner,

-vs.-

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Was the Congressional retention of a power to veto and/or waiver of the Congressional Budget and Impoundment Act of 1974 legal and properly exercised over the Omnibus Budget Reconciliation Act of 1982 and does the Petitioner have standing to raise the question?

Are there Constitutional limits to the tax or fee assessing powers of Congress and were they properly delegated in this case and do they exceed ability to pay and benefit?

Are there constitutional limits to the Congress' authority to classify retailers into wholesaler classifications found and to levy monetary executions upon trivial and non-burdening intrastate commerce and have the limits been exceeded in this case?

Are the assessing powers of the Secretary at 7 U.S.C. Sec. 1446(d) (2) & (3) subject to the other requirements of section 1446, which require that the Secretary find the cost of production to farmers and without such a standard are the levies constitutional or may the decision of the Secretary stand?

Has the capital of the Petitioner been confiscated without due compensation?

In the bundle of individual rights protected by the Constitution are there rights to conduct a non-offensive livelihood free from an attempt by Congress to force one from that livelihood and has the Petitioner been deprived of these rights?

On Summary Judgment may the Court determine disputed factual issues raised by conflict in affidavits of experts?

LIST OF PARTIES

Pursuant to Rule 21.1(b), Rules of the Supreme Court, Counsel for Petitioner, certify that the following is a complete list of all parties to the proceeding below:

1. Edward R. Mulroy d/b/a Mulroy Dairy Farms

2. John R. Block, Secretary of Agriculture of the United States of America.

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JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit to review that Court's Judgment entered in this matter on June 7, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It appears in the Appendix (hereinafter "A") hereto at A. The official citation is unavailable. The decisions of the United States District Court for the Northern District of New York are reported at 569 F.Supp. 256 and at 574 F.Supp. 194 and appear at Appendix B and Appendix C respectively.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 7, 1984. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Statutory provision being challenged is the Omnibus Budget Reconciliation Act of 1982, 95 Stat. 1219, 1256, 1257, 7 U.S.C. 1446(d) (2) (3) (Appendix D).

Also involved is the Congressional Budget and Impoundment Act of 1974, 88 Stat. 297; Title 2 U.S.C. Sec. 621, *et seq.*; (Appendix E) and the general Dairy Price Support law at 7 U.S.C. Sec. 1446 *et seq.*; (Appendix F).

STATEMENT OF THE CASE

BACKGROUND

In 1949 the Congress, facing surplus milk production from war years, enacted the Dairy Price Support program. For this purpose, the Congress found the Dairy industry to be vital to National Defense and General Welfare. It used only these powers in enacting the basic legislation (7 U.S.C. 1446(b)) (Appendix F) from its inception until now.

The program requires the Secretary through the CCC to purchase sufficient manufactured dairy products (butter, cheese, milk powder, etc.) so as to maintain a price for wholesale milk sold by farmers to dealers or cooperatives at a specified level called the parity price (7 U.S.C. 1446(c)) (Appendix F). It was and is not a retail price program.

For this purpose, the appropriation of public treasury monies was made (15 U.S.C. 713 a-11; 12, Appendix G) so as to fund the purchases. These funds were drawn on at all relevant times and were relieved by receipt of the Petitioner's monies.

In 1979 the Congress raised the wholesale parity price to a level that induced large surpluses of milk. It consequently faced revenue problems, since the program obligated purchases by the Secretary to sustain the artificial level.

In 1982 the Congress for the first time allowed the assessment of dairy farmers to obtain revenues so as to offset these rising expenditures.

The authority was delegated to the Secretary of Agriculture to assess farmers on milk sold commercially

two $.50 per hwt. assessments ($.01 per quart each) (Appendix D; Subsection (d) (2)& (3)). The statutory standards in the Petitioner's view deal with conferring authority not exercise of authority and accordingly were defective (Appendix D).

The Petitioner's exactions amount to $700.00 a month at $.50 per cwt. and $1,400.00 a month at $1.00 per cwt. These exceed net profits confiscating capital sufficiently to ultimately foreclose the Plaintiff's livelihood.

The Petitioner is the only Plaintiff in any suit against these assessments who produced, processed and sold only his own farm milk to local retail customers living within six miles of his plant. He had no contact with the CCC. He alleged he had no benefit from the program (Appendix J). He asserted he was no burden or affectation whatever to the program (Appendix J). He and his class comprised 1% of the market. They are the only retailers of milk who are regulated.

DISTRICT COURT

The Petitioner sued for an injunction and Declaratory Judgment in District Court, raising fact issues as to absence of any benefit and absence of burden or affectation of interstate commerce. (Appendix I, the Petitioner's expert affidavit.) The Petitioner himself denied all factual contentions, and claimed the assessments of $1,400.00 per month exceeded his net profit, confiscated his capital and foreclosed 50 years of business life.

On motions for Summary Judgment the Court ruled there were no material issues of fact at issue (Appendix C, page A 31), and held against the Petitioner as a matter of law, holding the Dairy Price Support program undergirded the Petitioner's retail prices, (a disputed

fact - Appendix I) and sales by the Petitioner displaced other milk sales (a disputed fact - Appendix I).

Thus on the law - and resolution of disputed facts without a hearing the District Court held against the Petitioner.

If in fact these are material findings, an obvious error has occurred.

No other findings on intrastate commerce, or on benefit, were made.

THE CIRCUIT COURT

The Circuit Court affirmed in a few lines on the District Court Opinion (Appendix A). It additionally referred to a Fourth Circuit decision, *Tindal v. Block* 717 F(2) 874 Cert. den. 104 S.Ct. 1444 (1984), which had only APA points before it but in which the Court *sua sponte* ruled on constitutional points without constitutional issues being formally before them or briefed. The certiorari request in that case was on APA grounds only - no certiorari was sought on constitutional issues.

This is the first known request for certiorari on the constitutional points.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI IS NEEDED TO GIVE CONSIDERATION TO *INS V. CHADHA* 103 S.CT. 2764

INS v. *Chadha,* 103 S.Ct. 2764, held unconstitutional a retained veto by the Congress over laws that were otherwise binding.

It was decided six weeks after the decision by the District Court. *INS* v. *Chadha* was decided June 23, 1983. The District Court in this case made its constitutional decision on May 5, 1983 (Appendix C).

The Circuit merely affirmed the District Court on the District's opinion and so gave *Chadha* no consideration (Appendix A).

Here like *Chadha* there was an exercise of a retained veto power over the law by the Senate (Sec. 904 of the Congressional Budget and Impoundment Act of 1984, Pub. L 93-344, 88 Stat. Title 2, U.S.C. Sec. 621) *et seq.*; see note to Sec. 621; Appendix E). The House waived the applicability of that Act and asserts the same power as the Senate to veto, although that is doubtful.

This veto was applied to the passage and handling of the Omnibus Budget and Reconciliation Act of 1982, containing the contested assessments, an act clearly within the scope of the 1974 Impoundment Act.

Under *Chadha* neither House could retain a veto over the laws of the United States and thereby interfere with the executive function, nor can they waive a law as the House attempted to do.

Since there has been, and is, no question but that every timetable, committee reference and requirement of the 1974 Impoundment Act was violated, the Bill was not properly before the Congress and was not lawfully passed.

Chadha was recognized as applying to the Impoundment Act of 1974 by a dissent in this Court at 103 S.Ct. 2812.

Certiorari thus is needed on an important question of the propriety of Congressional function in a vital area.

II

THIS COURT AND THE DISTRICT OF COLUMBIA CIRCUIT HAVE A DIFFERENT RULE ON STANDING TO SUE FOR VIOLATION OF RULES AND LAW BY THE CONGRESS THAN THE SECOND CIRCUIT FOLLOWED IN THIS CASE. CERTIORARI SHOULD ISSUE TO RESOLVE THIS CONFLICT

In *Vander Jagt* v. *O'Neill* 699 F(2) 1166, 1170 the District of Columbia Circuit granted standing to sue by directly aggrieved parties against Congressional violations of its rules and law.

In *Block* v. *Community Nutrition Institute* 52 L.W. 4697, 4706 standing to sue on direct personal affectation or involvement was allowed by this Court.

In our case the lower courts ruled we had no standing (Appendix C, page A 27). This issue was not reached by the Fourth Circuit in the case of *Tindal* v. *Block,* 717 F(2) 874 Cert. den. 104 S.Ct. 1144, a case referred to by the Second Circuit. Certiorari should issue to resolve this conflict.

III

THIS COURT AND THE DISTRICT OF COLUMBIA HAVE SET CONSTITUTIONAL LIMITS ON THE CONGRESS' TAXING OR FEE LEVYING POWERS THAT HAVE NOT BEEN OBSERVED BY THE SECOND CIRCUIT

In District Court the Petitioner maintained the Dairy Price Support program was confiscating and of no benefit (Appendix H).

The Government claimed its wholesale price support program affected retail price levels for the market upward, and that as a competitor the Petitioner benefited from this increase (Appendix J).

The Petitioner again denied any economic benefit (Appendix K).

The District Court adopted the Government argument (Appendix C, page A 24) even though it was denied as a matter of fact.

Thus it violated the rule on Summary Judgment that it is issue finding, not issue determination that is to be followed.*

Assuming arguendo however that the court properly made such a finding, that does not establish *substantial* benefit nor is there any *measure* of benefit in the finding and thus the finding does not satisfy constitutionality on this or other points.

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* See cases at page 16.

This Court set some boundaries to Congressional monetary exaction power and laid down some rules in *National Cable Television Ass'n v. United States* 415 U.S. 342 and *FPC v. New England Power* 415 U.S. 345. These were followed and applied in the District of Columbia Circuit in *National Cable Television Ass'n v. FCC* 554 F(2) 1094 (District of Columbia Cir. 1976).

These cases held (1) there is no power to confiscate by taxation (2) the taxing power may not be delegated to administrative agencies allowing them to become Appropriations Committees (3) governmental fees are allowed to be charged to offset expenses of administration of essentially private benefit regulation but the amount can not exceed the benefit actually conferred without becoming a tax (4) a hearing must be held on extent of benefit if fee status is given (5) in the hearing the government has the burden of proof.

These cases were cited to but not reflected upon by the Lower Court.

In this case the Petitioner claimed the assessment was confiscatory and that no benefit was conferred.

The District and Circuit Courts ruled that immaterial (Appendix C, page A 31).

They relied upon *Wickhard v. Filburn* 317 U.S. 111, a 1942 decision earlier than the above decision which found on admitted facts that benefit equal to or greater than the assessment existed.

Nor can Congress constitutionally single out an industry to pay for a public program in the National Defense and General Welfare interests without violating equal protection (Appendix H).

Certiorari should issue so as to resolve these questions arising between these cases.

IV

THE SECOND CIRCUIT'S DECISION IS AT VARIANCE WITH THE CONSTITUTIONAL LIMITS ON EXACTION OF MONIES ON WHOLLY INTRASTATE ACTIVITIES

In the District Court, the Petitioner, who only retails milk to consumers, flatly asserted that he had no economic connection whatever with the sale of raw milk to dealers and cooperatives by farmers, the price level to be supported by the program (Appendix J).

The Government did not assess any connection at the moment, but asserted an expert opinion (without any evidentiary support), that any *increase* in the sales of the Petitioner would displace retail sales of other retailers and ultimately would be purchased by the Commodity Credit Corporation.

It must be obvious that any sale of Coke, tea or coffee could have the same effect.

The Petitioner, in reply, again denied the issue (Appendix L).

The District Court found no relevant material facts at issue (Appendix C, page A 31) and then proceeded to find apparently as a matter of law, that Petitioner's sales displaced a quart of retail sales of someone else, and thus he burdened interstate commerce (Appendix C, page A 24). As can be seen, there was no evidentiary support for this finding. It was made without hearing.

The Petitioner asserts this procedure deprived him of due process and violates the principle that Summary Judgment is for issue finding, not determination.*

Assuming arguendo that the District Court's action was proper, it falls far short of the requirement of law for proof of *substantial* affectation or burden on interstate commerce. Such a finding is essential for constitutionality.

Here we are dealing with 1% of retail sales** and then only an indeterminate amount of increase in a small percentage of 1%. This is by definition trivial. Even fruit juice, coffee, tea, Coke or Pepsi have demonstrably higher impact and cross influence.

In *Hodel v. Virginia Surface Mining* 452 U.S. 264, 280, 101, S.Ct. 2362 it was held there must be a rational connection and "a substantial effect on interstate commerce is required". In *Heart of Atlanta Motel Inc.* 379 U.S. 258, 85 S.Ct. 358 "substantial and harmful effect was required". In *Maryland v. Wirtz* 392 U.S. 183, 197 No. 27 88 S.Ct. 2017, 2024 No. 27 the Court held: "neither here nor in Wickhard has the Court declared that Congress may use a relatively *trivial* impact upon commerce as an excuse for broad general regulation of state or private activities." In *NLRB v. Jones and Laughlin Steel Co.* 307 U.S. 1, 37, 57 S.Ct. 615, 624 the Court held there must be "substantial economic effect on interstate commerce" for regulatory authority.

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* *Abraham v. Graphic Arts International Union* 1981 660 F.(2) 811, *212* (Dist. of Columbia); *Watkins v. Northwestern Ohio Tractor Pullers Association, Inc.* C.A. Ohio 1980 & 630F(2) 1155; *Scharf v. U.S. Attorney General* C.A. Calif. 1979 597F(2) 1240; *Bouchard v. Washington* 1975 514F(2) 824, (Dist. of Columbia).

** *Wickhard v. Filburn* was based on 20% of the market.

Even *Wickhard v. Filburn* 317 U.S. 111, 127 involved 20% of the market not 1% as here and had findings of substantial impact.

It is further apparent that under Article I, Sec. 8, Clause 3 of the Constitution (Appendix H) the Petitioner has been irrationally classed with those who do business at the wholesale dealer cooperative level, and as a retailer has emerged with the dubious distinction of being the only retailer in the market place called upon to make payments.

The lack of rationality, the existence of discrimination and the denial of due process (Appendix H) and of equal protection (Appendix H) is apparent.

Certiorari should therefore issue.

V

THE ACT IS AN IMPORTANT PUBLIC ACT AND HAS BEEN WRONGLY CONSTRUED.

The Lower Courts and the Fourth Circuit wrongly construed 7 U.S.C. 1446(d) (2) & (3) the assessment authority to have been intended to be legally separated from the rest of the Section which contains the basic program.

The balance of the Section contains a requirement that the Secretary find that farmers are receiving cost production as defined by the act elsewhere.*

The result was that the act as construed by the Lower Court authorizes confiscation of capital without any statutory reference to ability to pay nor to benefit conferred.

This construction is not only unnecessary and unnecessarily raises constitutional points, it also is in legal error and has little legal support. There is considerable logic contrary. The Lower Court opinion in *Tindal v. Block* 558 FS 1004 clearly sets forth these arguments in detail in a well reasoned opinion.

The Circuit's construction was based upon the words prefatory to the assessing authority. These state "not withstanding any other provision of law" and continue on to allow assessing authority.

When the drafters of the same bill intended to separate a section into parts they did so in so many words, i.e. they said "not withstanding any provisions of this section" (at 7 U.S.C. 1441(d)), and, "not withstanding the provisions of this subsesction" (at 7 U.S.C. 1441(i) (3) (d)). They used the broader language only generally where generality was intended (7 U.S.C. 1441 (h) (1); (5) (A) (D) (12)).

***The basis for the price support authority is 7 U.S.C. 1446 which expressly requires "changes in cost of production" to be found. Cost of production is defined at 1446(b) as "including a fair return for their labor and investment when compared with the cost of things that farmers buy," and at 1441(a) cost of production studies in dairy area mandated by the Congress of the Secretary: "this study shall be updated annually and shall include all typical variable costs, inculding interest costs, a return on fixed costs and a return for management." The Secretary did such a study for Congress but did not notice the study or find upon it, although so requested by the Plaintiff who supplied it. (Appendix L)**

Accordingly, the Act has been wrongly construed, has needlessly raised constitutional questions and should be interpreted as an harmonious whole.

VI

FUNDAMENTAL RIGHTS ARE INVOLVED

The Court is requested to allow certiorari so that Congress can not single out an industry and levy assessments so as to drive people from that livelihood, invading a fundamental right reserved to a citizen and a claim of power foreign to our customs and laws.

CONCLUSION

For the reasons given, a full Writ of Certiorari should issue.

Respectfully submitted,

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APPENDIX

A1

Appendix A

Decision Order Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1304—August Term 1983

Argued June 1, 1984 Decided June 7, 1984

Docket No. 84-6025

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,

Plaintiff-Appellant,

—v.—

JOHN R. BLOCK, Secretary of the United States Department of Agriculture,

Defendant-Appellee.

Before:

FEINBERG, *Chief Judge,*
KAUFMAN and PIERCE, *Circuit Judges.*

Appellant challenges the authority of the Secretary of Agriculture to collect deductions on the proceeds of milk

sold commercially, pursuant to section 101 of the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763 (codified at 7 U.S.C. § 1446(d) (amended 1983)).

Affirmed.

JOHN BENJAMIN CARROLL, Syracuse, NY (Carroll, Carroll, Butz, Storinge & Young, of Counsel), *for Plaintiff-Appellant.*

DOUGLAS LETTER, Attorney, Appellate Staff, Civil Division, Department of Justice, Washington, DC (Frederick J. Scullin, Jr., United States Attorney, Richard K. Willard, Acting Assistant Attorney General, Leonard Schaitman, Attorney, Department of Justice, Washington, DC, of Counsel), *for Defendant-Appellee.*

PER CURIAM:

Edward Block appeals from a judgment of the United States District Court for the Northern District of New York, Howard G. Munson, Ch.J., granting appellee's motion for summary judgment. Appellant sought to enjoin the Secretary of Agriculture from collecting deductions on the proceeds of commercial milk sales pursuant to section 101 of the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763 (codified at 7 U.S.C. § 1446(d) (amended 1983)). Appellant raises nu-

merous objections to the statute and to the manner in which the Secretary implemented the deduction program. Having considered all of appellant's arguments, we affirm the judgment of the district court, for the reasons set forth in Chief Judge Munson's two opinions, which are reported at 569 F. Supp. 256 and at 574 F. Supp. 194 (N.D.N.Y. 1983). We note that arguments similar to those raised by appellant were also rejected in thorough opinions by the United States Court of Appeals for the Fourth Circuit in South Carolina ex rel. Tindal v. Block, 717 F.2d 874 (4th Cir. 1983), cert. denied, 104 S.Ct. 1444 (1984), and by the United States District Court for the Southern District of New York in Mandel v. Block, 573 F. Supp. 1522 (S.D.N.Y. 1983).

Judgment affirmed.

UNITED STATES COURT OF APPEALS
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June, one thousand nine hundred and eighty-four.

Present:

HON. Wilfred Feinberg
HON. Irving R. Kaufman
HON. Lawrence W. Pierce
Circuit Judges,

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,
Plaintiff-Appellant,
v. 84-6025
JOHN R. BLOCK, Secretary of the United States Department of Agriculture,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District

Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith, Clerk
s/Edward J. Guardaro

By EDWARD J. GUARDARO
Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH
s/Elaine B. Goldsmith
Clerk

APPENDIX B

Memorandum, Decision and Order, dated 11/22/83.

United States District Court
Northern District of New York

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,
Plaintiff-Appellant,

v. 84-6025

JOHN R. BLOCK, Secretary of the United States Department of Agriculture,
Defendant-Appellee.

Memorandum-Decision and Order.

On October 29, 1982, the plaintiff, Edward Mulroy, commenced this action seeking to temporarily, preliminarily and permanently enjoin the defendant, John R. Block, from collecting funds pursuant to Title I of the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, Section 101, 96 Stat. 763 (Sept. 8, 1982 (amending 7 U.S.C. Section 1446)). Plaintiff initially challenged the assessment provisions on various constitutional grounds. On May 5, 1983 this court granted defendant's motion for summary judgment concluding that the statute authorizing the deduction was constitutionally valid and that the challenged regulations did not violate the National Environmental Policy Act. Plaintiff subsequently amended his complaint and raised the new allegation that the Secretary of Agriculture did not comply with the requirements of the Administrative Procedure Act [APA], 5 U.S.C. §551 *et seq.*, when he determined to begin collecting the 50-cent per hundredweight deduction. A detailed statement of the facts of this case is set out in the court's earlier decision, see *Mulroy v. Block*, 569 F. Supp. 256 (N.D.N.Y. 1983), familiarity with which is assumed.

Presently before the court is a motion by the plaintiff for preliminary relief and for summary judgment and a cross-motion by the defendant for summary judgment. These motions were orally argued on April 15, 1983. Following the hearing the court took the matter under advisement and has since reviewed the memoranda of counsel, the administrative record, submitted affidavits, and pertinent cited authority. Based upon the foregoing the court concludes that the Secretary of Agriculture fully complied with the APA. Accordingly, plaintiff's motions are denied and defendant's motion for summary judgment is hereby granted.

The court has based its decision primarily upon the Fourth Circuit's recent decision in *State of South Carolina ex rel. Tindal v. Block,* Nos. 83-1426 and 83-1511 (4th Circ. Sept. 9, 1983). In an exhaustive review of administrative law challenges to the present milk price support legislation, the Fourth Circuit concluded that the Secretary fully complied with the APA. To the extent that the issues involved in the present lawsuit are identical to those before the Fourth Circuit, the court finds that the reasoning and result of the Fourth Circuit decision is dispositive of this case.

It is interesting to note that the Fourth Circuit, in upholding the present legislation and regulations, concluded that:

> We may well consider the tool given by the Secretary to be blunt, and its use by the Secretary to effectively drive some producers 'out of business' to be harsh as it applies to small dairy operations. It is clear, however, that Congress was aware of the possibility of harsh results to some small farmers . . . . Were we the Secretary, we might well have searched long for a more humane alternative, but our judicial task is not to substitute our judgment for that of the administrative agency.

Id. at 35.

It appears to me that this language reflects the Fourth Circuit's implicit view that, notwithstanding the pernicious nature of the challenged legislation, judicial activism is the greater evil.

I reluctantly uphold the challenged regulations for the same reasons. At a time like this it is unfortunate that the judgment of this court cannot be substituted for the legislative branch of our government, when, as here, it is apparent that the judgment of the legislative branch was unwise. It seems incongruous that Congress, in an effort to provide dairy farmers of this nation with a minimum level of support, has chosen a measure which will inevitably bring about the demise of many those same dairy farmers. Indeed, in a time when this nation is experiencing the decline and threatened extinction of the individual farmer, it is particularly disturbing to see legislation such as this which will undoubtedly have a devastating effect on the small scale dairy farmers of this nation.

Sadly, I may not be swayed by my own view of the inequities which may occur as a result of this governmental action. This court is constrained to adhere to its role of judicial deference and restraint.

Accordingly, there being no material issue of fact, and defendant being entitled to judgment as a matter of law, defendant's motion for summary judgment is hereby granted.

It is so Ordered.

Dated: November 22, 1983
Syracuse, New York

S/ Howard G. Munson
HOWARD G. MUNSON
Chief U.S. District Judge

APPENDIX C

Memorandum Decision, dated 5/5/83.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,
Plaintiff-Appellant,
v. 82-CV-1191

JOHN R. BLOCK, Secretary of the United States Department of Agriculture,
Defendant-Appellee.

MEMORANDUM - DECISION

On October 29, 1982, the plaintiff, Edward Mulroy, commenced this action seeking to temporarily, preliminarily and permanently enjoin the defendant, John R. Block, from collecting funds pursuant to the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, Section 101, 96 Stat. 763 (Sept. 8, 1982 (amending the Agricultural Act of 1949, as amended by the Agriculture and Food Act of 1981, 7 U.S.C Section 1446)). Presently before the Court are cross motions for summary judgment.

FACTS

Edward Mulroy is a dairy farmer in Marcellus, New York. He owns a farm, 100 cows, a processing plant and delivery trucks. With these, he produces and sells milk directly to consumers within an eight mile radius of the plant. The class of persons who do business in a manner similar to that of the plaintiff is known as producer-handler of milk. Approximately one percent of the milk in the United States is produced in a similar manner. Mulroy does not sell milk at the wholesale level nor does he sell or purchase milk or milk products from any other dealer, cooperative or the Commodity Credit Corporation.

John Block is responsible for administering the federal milk price support program and the federal milk marketing order system. The federal milk price support program is carried out through the Commodity Credit Corporation (CCC), a governmental corporate entity within the United States Department of Agriculture.

In order to ensure American consumers of adequate milk supplies, the CCC has a standing offer to purchase unlimited quantities of milk products at prices set by Congress. 7 U.S.C.A. § 1446(c) (Supp. 1982). Since the mid-1970's, the minimum level price support mandated by Congress has increased. Consequently, producers have been encouraged to expand milk production, even in excess of commercial market demand. In the past two marketing years, the CCC has purchased approximately 10% of all milk produced in the United States. In fiscal year 1982, the CCC spent about 2.3 billion dollars to purchase dairy products under the price support program. As of November 12, 1982, the CCC had uncommitted inventories of approximately 407 miillion pounds of butter, 792 million pounds of cheese and 1.2 billion pounds of non-fat dry milk. The annual storage costs are approximately 50 million dollars. Affidavit of Everett G. Rank, Executive Vice President CCC, at ¶ 6, December 10, 1982.

In an attempt to restore a balance between milk production and commercial demand for dairy products, to reduce the waste of resources committed to producing surplus dairy products and to reduce the huge expenditures of taxpayers' money to purchase surplus products, Congress has enacted certain amendments to the milk price support system as part of the Omnibus Budget Reconciliation Act of 1982, 7 U.S.CA. § 1446(d)(2) & (3) (Supp. 1982).

The dairy provisions of that Act provide:

> Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for

> a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should estimate that such net price support purchases during that fiscal year would be less than 5 billion pounds, the authority for requiring such deduction shall not apply for the balance of the year.

7 U.S.CA. § 1446(d)(2) (Supp. 1982).

In addition, the statute provides:

> Effective for the period beginning April 1, 1983 and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period . . . . The Secretary may make such adjustments in individual bases under this subparagraph as the Secretary determines necessary to correct for abnormal factors affecting production and to reflect such other factors as the Secretary determines should be considered in determining a fair and equitable base.

7 U.S.CA. § 1446(d)(3)(A) (Supp. 1982).

Section 1446(d)(3)(B) of Title 7 provides for the refund of the second fifty cents upon certain conditions:

> Refunds under this paragraph shall be based on reductions in commercial marketings as specified by the Secretary, but the Secretary may not require as a condition for making a refund of the entire amount collected from a producer that the producer reduce marketings in excess of a reduction equivalent to the ratio that the total amount of surplus milk production, as estimated by the Secretary for the fiscal year, bears to the total milk production estimated for such period. The Secretary may provide for refunds to be made of amounts collected from producers on a pro rata basis taking into consideration the reduction in commercial marketings by the producer from the commercial marketings during the base period.

On September 22, 1982, the Secretary projected that for the fiscal year beginning October 1, 1982, the net price support purchases of milk would be 12.6 billion pounds and consequently, determined to impose the initial 50 cent assessment effective December 1, 1982. This decision to assess was published as a "notice of determination" on September 24, 1982, in 47 Federal Register at 42128.

Also on that date, the Secretary noticed and invited comment on a related "proposed rule." 47 Fed. Reg. 42112 (Sept. 24, 1982). The "proposed rule" dealt exclusively with the procedure by which the Secretary would collect the already determined assessment. In other words, the proposed rule assumed the assessment and invited comment merely as to the procedure by which the assessment would be collected. 47 Fed. Reg. 42112 (Sept. 24, 1982).

On November 30, 1982, the "final rule" setting forth the administrative procedures that would be used to implement the deduction was published. 47 Fed. Reg. 53831 (Nov. 30, 1982). In accordance with this mandate, the first deductions were to be made in December, 1982. On December 21, 1982, however, the Hon. Matthew J. Perry, United States District Judge for the District of South Carolina entered an order temporarily restraining the defendant from collecting the assessment. Thereafter, on January

10, 1983, Judge Perry preliminarily enjoined the defendant from doing the same. The basis of the injunction was a determination by Judge Perry that the regulation imposing the assessment was violative of the Administrative Procedure Act.

Following the entry of Judge Perry's order, the Secretary published a new "notice of proposed determination" inviting public comment regarding the assessment. 48 Fed Reg. 3764 (Jan. 27, 1983). On March 17, 1983, the Secretary published a final "notice of determination" concluding that the 50 cent per hundredweight assessment would be collected beginning April 16, 1983. 48 Fed. Reg. 11253 (March 17, 1983).

DISCUSSION

Mulroy now challenges the statute and regulation on both procedural and substantive grounds. Specifically, he alleges:

> 1) The dairy provisions of the Act unconstitutionally delegate taxing power to the Secretary of Agriculture;
> 2) The dairy provisions of the Act do not set forth sufficient standards to guide the Secretary in making a determination of whether or not to impose either deduction or refund;
> 3) The dairy provisions of the Act unlawfully delegate power to non-federal employees at 7 U.S.C.A. §1446(D)(7);
> 4) The dairy provisions of the Act are an unconstitutional attempt to regulate intrastate commerce;
> 5) The dairy provisions of the Act, if an exercise of the commerce power, are invalid in that they are irrational, discriminatory, and there was no showing of need and no public hearing;
> 6) The dairy provisions of the Act, as a revenue raising measure, are invalid because they did not originate in the House of Representatives as required by Article 1, Section 7, clause 1 of the United States Constitution;
> 7) The dairy provisions of the Act are invalid because they are not passed in compliance with the rules of the House and Senate which forbid the insertion of new matter in

> conference bills and because they were not referred to the Budget Committees as required by 31 U.S.C. § 1327; and 8) The Secretary's determination to assess is not in compliance with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*

For the reasons which follow, this Court is constrained to conclude that the statute authorizing the deduction is constitutionally valid and the regulation is in compliance with the National Environmental Policy Act (NEPA).

THE DELEGATION CLAIM

The plaintiff's claim that the Act is an unconstitutional delegation is three-fold. First, Mulroy alleges that the Act unconstitutionally delegates the taxing power to the Secretary of Agriculture. Second, the plaintiff claims that the Act, if an exercise of the commerce power, is invalid for lack of sufficient standards to guide the Secretary in making a determination whether or not to impose either deduction or refund. Finally, Mulroy alleges that the Act unlawfully delegates power to non-federal employees.

With regard to the plaintiff's first allegation, that the Act is an unconstitutional delegation of the taxing authority, this Court finds that the Act, rather than being a taxing measure, is a proper exercise of the power of Congress to regulate commerce. In making such a determination,

> [t]he test to be applied is to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effectivce the congressional enactment.

Rodgers v. United States, 138 F.2d 992, 994 (6th cir. 1943). The court went on to state:

> The power of Congress to 'regulate commerce' is the power to prescribe the rules by which commerce is to be governed and the Congress is at liberty to adopt any method which it deems effective to accomplish that permitted end.

Id. That "revenue may incidentally arise therefrom does not divest the regulation of its commerce character and render it an exercise of the taxing power." *Id.* at 994.

The Act with which this Court is here concerned has for its primary object the regulation of milk production. The means chosen by Congress to that end is the imposition of an assessment. The imposition of penalties and assessments have long been a permissible means of regulating commerce. *See, e.g., Wickard v. Filburn,* 317 U.S. 111 (1942).

The dairy provisions at issue here were enacted in an attempt to restore a balance between milk production and commercial demand for dairy products. Although the assessment will reduce the huge expenditures of taxpayers' money used to purchase the surplus dairy products, reduction of production, and not the raising of revenue is the primary goal of the assessment. This is made clear by the fact that the assessment is tied to the Secretary's estimate of the annual net price support purchases. ' Accordingly, the dairy amendments must be characterized as an exercise of the commerce power and not an unconstitutional exercise of the taxing power.

Mulroy's second delegation claim is that the dairy amendments are invalid because there are no statutory standards to guide the Secretary of Agriculture in determining the initial 50 cent per hundredweight assessment, the second assessment or the refund. The legislation, Mulroy maintains, gives the Secretary unfettered discretion to determine when to assess and when to refund. Moreover, Mulroy asserts that any seeming limitations on the Secretary's power are withdrawals of power, not standards to guide

the Secretary in exercising his authority. As such, the plaintiff maintains, they fail to legitimize the Secretary's authority.

In 1690, John Locke wrote:

> The legislature cannot transfer the power of making laws to any other hands for it being but a delegated power from the people, they who have it cannot pass it over to others.

J. Locke, *Second Treatise of Civil Government, in the Tradition of Freedom,* ¶ 141 (M. Mayer ed. 1957). Two hundred years later, the Supreme Court, in *Field v. Clark,* 143 U.S. 649 (1892), expressly recognized this limitation. "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692. Nevertheless, the Supreme Court has also recognized that the "hermetic sealing-off of the three branches of government from one another could easily frustrate the establishment of a National Government . . . ." *Industrial Union Dept. v. American Petroleum Institute,* 448 U.S. 607, 673 (1980)(J. Renquist, concurring). *See also, J.W. Hampton & Co. v. United States,* 276 U.S. 394 (1928). In reconciling these competing principles, the Supreme Court has only twice struck down legislation as an excessive delegation of legislative authority to the Executive. *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935); *A.L.A. Schecter Poultry Corp. v. United States,* 295 U.S. *495* (1935).

In *Panama Refining Co.,* the Supreme Court struck down legislation which authorized the President to:

> prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any state law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a state. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000.

Panama Refining Co v. Ryan, 293 U.S. 388, 406 (1935) *quoting* the National Industrial Recovery Act of June 6, 1933.

Concluding that the statute did not lay down rules for the guidance of state legislatures, that it did not qualify the President's authority by reference to the basis or extent of the state's limitations on production, that it did not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the petroleum, that it established no criteria to govern the President's course and that it did not require any finding by the President as a condition of his action, the Court struck down the legislation. *Id.* at 415.

Likewise, in *Schechter Poultry,* the Court struck down a statute whose purpose was "to rehabilitate industry and to conserve natural resources," finding that the legislation prescribed no method of attaining that end save by establishing codes of fair competition, the nature of whose provisions were not defined. In addition the Court relied on the fact that the legislation provided no standards to which the codes were to conform and that the function of formulating the codes was delegated to private individuals engaged in the industries to be regulated. 295 U.S. at 541-42.

Since the *Schechter* decision, no federal court has held a statute unconstitutional based on excessive delegation. Indeed, several courts have intimated that the delegation doctrine is dead. *See, e.g., FPC v. New England Power Co.,* 415 U.S. 345, 353 (1974)(J. Marshall, concurring)("the notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's has been virtually abandoned by the Court for all practical purposes"); *National Association of Property Owners v. United States,* 499 F. Supp. 1223, 1239 (D. Minn. 1980)(the delegation doctrine was "laid to rest"). While not ascribing to the belief that the delegation doctrine is dead, this Court nevertheless does not find that the legislation here at issue is invalid on grounds of improper delegation.

In *American Power & Light Company v. Securities & Exchange Commission,* 329 U.S. 90 (1946), the Supreme Court announced that for delegation purposes it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 105.

Applying this holding to the Agricultural Act of 1949, as amended, this Court concludes that the delegation here is proper. Here Congress announced the policy behind the legislation: to restore a balance between milk production and commercial demand for dairy products; Congress declared who would administer the program - the Secretary of Agriculture; and Congress specified the maximum amount of the assessment - $1.00 per hundredweight. Moreover, Congress specified when the assessment could be levied - in the case of the first 50 cent assessment, when the Secretary estimates that net price support purchases of milk or milk products would be at least 5 billion pounds milk equivalent, in the case of the second 50 cent assessment, when the Secretary estimates the same at 7.5 billion pounds milk equivalent; and Congress stated the effective period for the assessment - for the first 50 cent assessment, between October 1, 1982 and September 30, 1985, and for the second 50 cent assessment, between April 1, 1983 and September 30, 1985. 7 U.S.C.A. § 1446(d) (Supp. 1982). In addition, Congress declared with specificity the conditions and manner under which the Secretary would be required to refund the second 50 cent assessment. *Id.*

While the authority given to the Secretary is broad, it is not without limitation and by no means does it run afoul of the Constitution.

The plaintiff's third delegation claim is a bald assertion that Title 7 United States Code, Section 1446(d)(7) (Supp. 1982), which authorizes the Secretary of Agriculture to use state and county agriculture officials to help carry out the assessment is an unlawful delegation of power to non-federal employees. This Court simply concludes that because the statute merely authorizes the

Secretary to seek the assistance of non-federal employees. This Court simply concludes that because the statute merely authorizes the Secretary to seek the assistance of non-federal employees in "carrying out" the program, and not in any policy-making capacity, the contested provision does not exceed lawful bounds.

COMMERCE CLAIMS

Fourth, the plaintiff maintains that the dairy amendments are an unconstitutional attempt by Congress to regulate *intra*state commerce. In this regard the plaintiff relies on the fact that all the milk he produces is sold directly to consumers within an 8 mile radius of this farm, and all within Onondaga County and the State of New York.

Article I, Section 8, clause 3 of the United States Constitution provides that Congress shall have the power "[t]o regulate commerce with foreign Nations and among the several States, and the Indian Tribes." It is well settled that pursuant to this provision Congress may regulate wholly intrastate activity that has an effect on interstate commerce. *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, 277 (1981); *Wickard v. Filburn,* 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.,* 315 U.S. 110 (1942). In *Wickard,* the plaintiff sought to enjoin enforcement of a wheat marketing penalty imposed by the Agricultural Adjustment Act of 1938, as amended. The Court denied the injunction and held that the marketing quota could be applied to a farmer who grew a small amount of wheat primarily for his own use. Finding that "[h]ome-grown wheat in this sense competes with wheat in commerce, " the court held that although the farmer's "own contribution to the demand for wheat may be trivial by itself, [it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-28.

By the same token, it must be said that the milk Mulroy sells competes with milk produced elsewhere, milk that might otherwise be sold to Mulroy's customers. When, as here, Congress has

determined that the activity of the plaintiff's class imposes burdens upon the flow of milk interstate, Congress may regulate that activity. *Katzenbach v. McClung,* 379 U.S. 299 (1964); *Wickard v. Filburn,* 317 U.S. 111 (1942). For this reason, the challenged legislation is a proper exercise of the commerce power.

Fifth, the plaintiff maintains that the dairy amendments, if an exercise of the commerce power, are invalid in that there was no showing of need and no public hearing, and that the amendments are irrational and discriminatory.

At the outset, this Court notes that formal findings of need are not necessary to the valid exercise of the commerce power. *Katzenbach v. McClung,* 379 U.S. 299 (1964). Moreover, having previously determined that the activity being regulated affects interstate commerce, "the only remaining question for judicial inquiry is whether "the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution." *Hodel v. Virginia Surface Mining & Reclamation Assn.,* 452 U.S. 264, 276 (1981) *citing Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 258 (1964); *United States v. Darby,* 312 U.S. 100, 121 (1941); *Katzenbach v. McClung,* 379 U.S. 294, 304 (1964). "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis . . . between the regulatory means selected and the asserted ends." *Hodel v. Indiana,* 452 U.S. 314, 317-18 (1981).

While this Court is of the opinion that the dairy provisions are unwise and may unnecessarily bring about the demise of many small scale farmers, it cannot be said that the legislative scheme is not rationally related to Congress' purpose of reducing the overproduction of milk and milk products. In that the legislation in question ties the assessment to the level of net price support purchases and requires refunds to issue to those producers who reduce their marketings in conformity with a designated schedule, this Court believes that the legislation is rational.

Moreover, it cannot be said that the Act discriminatorily taxes Mulroy, like other dairy farmers in Central New York, to support those farmers who are guilty of overproduction. Congress

has determined that the deduction should apply to *all* milk marketed commercially by producers. Because the price support level established by Congress undergirds the price Edward Mulroy can command for his milk, and because Mulroy has an indirect effect on the overproduction,[2] this Court feels constrained to conclude that the dairy amendments are not irrational or arbitrary and do not discriminatorily tax the plaintiff.

PROCEDURAL CLAIMS

The plaintiff's sixth claim is that the Act, as revenue raising legislation, is invalid because it did not originate in the House of Representatives. In this regard, the plaintiff cites Article 1, Section 7, clause 1 of the United States Constitution which provides:

> All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

While it is true that revenue raising legislation must originate in the House of Representatives, it has long been recognized that this limitation is "confined to bills [which] levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue." *United States v. Norton,* 91 U.S. 566, 569 (1875) *quoting* J. Story on the Constitution ' 880. Thus, Article 1, Section 7(1) does not invalidate those revenue raising "impositions made incidentally under the commerce clause . . . . as a means of constraining and regulating." *United States v. Strangland,* 242 F.2d 843, 848 (7th Cir. 1957).

As previously discussed, the imposition with which this Court is here concerned has for its primary purpose the regulation of milk production. Moreover, whatever assessments are imposed are but means to the purpose provided by the Act. *Millard v. Roberts,* 202 U.S. 429, 437 (1906). As such, the assessment provisions are not revenue raising measures within the meaning of Article 1, Section 7, clause 1 of the United States Constitution.

At the same time, and regardless of the primary purpose of the dairy amendments, this Court must reject the plaintiff's allegation that the bill imposing the assessment did not originate in the House of Representatives. Although that portion of the Omnibus Budget Reconciliation Act which imposes the assessment was not provided as part of the original House bill, but rather appeared by way of an amendment, in that the amendment was germane to the subject matter of the bill, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911), the legislation at issue comports with Article 1, Section 7, clause 1 of the Constitution in all respects. In making this determination, however, this Court does not wish to be regarded as holding that

> the journals of the House and Senate may be examined to invalidate an act which has been passed and signed by the presiding officers of the House and Senate and approved by the President and duly deposited with the State Department.
> 220 U.S. at 143.

By the same token, this Court must reject the plaintiff's seventh claim that the dairy provisions of the Act are invalid because they were not passed in compliance with the rules of the House and Senate which forbid the insertion of new matter into conference bills. It has long been the rule that

> [t]he signing by the Speaker of the House of Representatives and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that the bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval and is deposited in the public archives, its authentication as

> a bill that has passed Congress should be deemed complete and unimpeachable . . . . The respect due to co-equal and independent departments requires the judicial department to act upon that assurance and to accept, as having passed Congress, all bills authenticated in the manner stated, leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution.

Twin City Bank v. Nebeker, 167 U.S. 196, 201 (1897).

In a related argument, the plaintiff maintains that the dairy provisions of the Act are invalid because they were not referred to the Budget Committee of each House as required by Title 31 United States Code, Section 1327 (now codified at Title 2 United States Code, Section 637). That statute provides:

> No bill or resolution, and no amendment to any bill or resolution dealing with any matter which is within the jurisdiction of the Committee on the Budget of either House shall be considered in that House unless it is a bill or resolution which has been reported by the Committee on the Budget of that House (or from the consideration of which such committee has been discharged) or unless it is an amendment to such a bill or resolution.

Assuming *arguendo* that the enrolled rules doctrine does not prevent this Court from determining Congress' compliance with Title 2 United States Code, Section 637, it is clear that Congress complied with that provision in all respects. Congressman Jones of Oklahoma, the Chairman of the House Budget Committee requested a waiver of the requirements of Title 7 United States Code, Section 637. To his request, there was no objection. *See* H.R. 6955, 128 Cong. Rec. H5539 (Aug. 10, 1982). Likewise, those requirements were waived by unanimous consent in the Senate. H.R. 6955, 128 Cong. Rec. S10222 (Aug. 11, 1982). Accordingly, this portion of the plaintiff's claim must also be rejected.

NATIONAL ENVIRONMENTAL POLICY ACT CLAIM

Finally, the plaintiff maintains that the Secretary of Agriculture's action is improper because he failed to file a statement pursuant to the National Environmental Policy Act (NEPA), Title 42 United States Code, Section 4321 *et. seq.* NEPA requires that in the case of "major Federal actions significantly affecting the quality of the human environment" federal agencies must prepare "a detailed statement by the responsible official on -- (i) the environmental impact of the proposed action." Title 42 United States Code, Section 4332 (2) (c) (i).

Recently, the Supreme Court stated:

> The theme of § 102 is sounded by the adjective 'environmental'. NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment . . . . [W]e think the context of the statute shows that Congress was talking about the physical environment - the world around use, so to speak.

Metropolitan Edison Co. v. People Against Nuclear Energy, 51 U.S.L.W. 4371, 4373 (April 19, 1983). A court must look at the relationship between a particular effect and the change in the physical environment caused by the major federal action at issue in order to determine whether NEPA requires consideration of that effect. *Id.* NEPA, the Court stated, "include[s] a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue." *Id.*

In the Second Circuit, determination of such an effect is left to the relevant agency. In *Cross-Sound Ferry Services, Inc. v. United States*, 573 F.2d 725 (2d Cir. 1978), the Second Circuit stated,

> [a]n EIS is required only in the case of major federal actions significantly affecting the quality of the human en-

> vironment. The identification of such action is the responsibility of the relevant federal agency to be carried out against the background of its own particular operations.

Id. at 731. In furtherance of this policy, the Second Circuit has held that "an agency's determination that an impact statement is not required will be overturned by a reviewing court only if it is arbitrary, capricious, or an abuse of discretion. *Id.* at 731-32. *Compare, Foundation for North American Wild Sheep v. United States Department of Agriculture,* 681 F.2d 1172, 1177 (9th Cir. 1982); *Highland Cooperative v. City of Lansing,* 492 F. Supp. 1372, 1377 (W.D. Mich. 1980) (agency's action will be overturned if unreasonable).

Whereas purely economic issues by themselves are not within the zone of interest to be protected by this law, where economic interests are interrelated with environmental effects, all effects on human environment should be considered in an environmental impact statement. *Highland Cooperative,* 492 F. Supp. at 1372.

In the instant case, the Secretary of Agriculture gave public notice of the proposed federal action. 48 Fed. Reg. 3764 (January 27, 1983) and an opportunity for interested parties to submit relevant data. After reviewing the comments and completing an environmental evaluation of the effect of the assessment, the Secretary of Agriculture concluded that an Environmental Impact Statement was unnecessary because the assessment " is not expected to have any significant impact on the quality of the human environment." 48 Fed. Reg. 11253 (March 17, 1983). In view of the fact that the assessment is only to be levied for the period between April 16, 1983 and September 30, 1985, and that any effect of the assessment on the human environment would be indirect at best, and that the plaintiff has not alleged specific facts which, if true, would demonstrate that the proposed project may significantly degrade some human environmental factors, *Foundation for American Wild Sheep,* 681 F.2d at 1178, this Court concludes that the Secretary's decision that an EIS was not required was neither "arbitrary, capricious or an abuse of discretion. " Accordingly, the plaintiff's claim in this respect must fail.

CONCLUSION

For the foregoing reasons, this Court is compelled to uphold the dairy amendments of the Omnibus Budget and Control Act and the Secretary's regulations imposing the assessment insofar as it complies with NEPA. [3] This is so notwithstanding this Court's judgment and the judgment of many others that the statute is bad law and the assessment unwise.

It seems incongruous that Congress, in an effort to provide dairy farmers of this nation with a minimum level of support, which after all, is in part what the price support program is all about, 7 U.S.C.A. §1446b (1973), has chosen a measure which will inevitably bring about the demise of many of these same dairy farmers. Indeed, in a time when this nation is experiencing the decline and threatened extinction of the individual farmer, it is particularly disturbing to see legislation such as this which will undoubtedly have a devastating effect on the small scale dairy farmers of this nation.

At a time like this, it is unfortunate that the judgment of this Court cannot be substituted for the judgment of the legislative branch of our government, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 173- 74 (1911), when, as here, it is apparent that the judgment of the legislative branch was unwise. Sadly, I may not be swayed by my own view of the inequities which may occur as a result of this governmental action. *Wickard v. Filburn*, 317 U.S. 111, 129 (1942); *Flint v. Stone*, 220 U.S. 107, 169 (1911). Rather, I must reside in the hope that Congress in its wisdom will shortly determine to rectify the inequities which inevitably will result from the imposition of this assessment.

There being no material issue of fact, and defendant being entitled to a judgment as a matter of law, defendant's motion for summary judgment is granted and plaintiff's motion for summary judgment is denied.

Dated: May 5, 1983
Syracuse, New York

S/ Howard G. Munson
HOWARD G. MUNSON
Chief U. S. District Judge

FOOTNOTES

[1]The Secretary may not impose the 50 cent per hundredweight assessment in any year in which he estimates that net price support purchases will be less than 5 billion pounds. 7 U.S.C.A. § 1446(d)(2) (Supp. 1982). Likewise, the Secretary may not impose the second 50 cent per hundredweight assessment in any year in which he estimates that net price support purchases will be less than 7.5 billion pounds. 7 U.S.C.A. § 1446(d)(3)(A) (Supp. 1982). Moreover, if the second 50 cent assessment is to be imposed, the Secretary must provide a program for refunds to those producers who reduce their commercial marketings. 7 U.S.C.A. § 1446(d)(3)(A) (Supp. 1982).

[2] For every gallon of milk the plaintiff sells locally, some other producer loses a sale. The government, then, must purchase the surplus milk.

[3] At this time, this Court makes no determination as to the regulation's conformity with the Administrative Procedure Act.

APPENDIX D

Omnibus Budget Reconciliation Act of 1982

TITLE 1-AGRICULTURE, FORESTRY, AND RELATED PROGRAMS

Subtitle A-Dairy Price Support Program

Sec. 101. Section 201 of the Agriculatural Act of 1949, as amended by the Agriculture and Food Act of 1981, is amended by--

(1) effective October 1, 1982, striking out everything in subsection (c) after the first sentence and preceding the sentence which begins "Such price support shall be provided";

(2) adding a new subsection (d) as follows:

"(d) Notwithstanding any other provision of law--

"(1)(A) Effective for the period beginning October 1, 1982, and ending September 30, 1984, the price of milk shall be supported at not less than $13.10 per hundredweight of milk containing 3.67 per centum milkfat.

"(B) Effective for the fiscal year beginning October 1, 1984, the price of milk shall be supported at not less than such level that represents the percentage of parity that the Secretary determines $13.10 represented as of October 1, 1983.

"(C) The price of milk shall be supported through the purchase of milk and the products of milk.

"(2) Effective for the period beginning October 1, 1982, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Commodity Credit Corporation to offset a portion of the cost of the milk price support program. Authority for requiring such deductions shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should

estimate that such net price support purchases during that fiscal year would be less than 5 billion pounds, the authority for requiring such deduction shall not apply for the balance of the year.

"(3)(A) Effective for the period beginning April 1, 1983, and ending September 30, 1985, the Secretary may provide for a deduction of 50 cents per hundredweight, in addition to the deduction referred to in paragraph (2), from the proceeds of sale of all milk marketed commercially by producers to be remitted to the Corporation. The deduction authorized by this subparagraph shall be implemented only if the Secretary establishes a program whereby the funds resulting from such deductions would be refunded in the manner provided in this paragraph to producers who reduce their commercial marketings from such marketings during the base period. For the purpose of this paragraph, the based period shall be the fiscal year beginning October 1, 1981, or at the option of the Secretary, the average of the two fiscal years beginning October 1, 1980. The Secretary may make such adjustments in individual bases under this subparagraph as the Secretary determines necessary to correct for abnormal factors affecting production and to reflect such other factors as the Secretary determines should be considered in determining a fair and equitable base.

"(B) Refunds under this paragraph shall be based on reductions in commercial marketings as specified by the Secretary, but the Secretary may not require as a condition for making a refund of the entire amount collected from a producer that the producer reduce marketings in excess of a reduction equivalent to the ratio that the total amount of surplus milk production, as estimated by the Secretary for the fiscal year, bears to the total milk production estimated for such period. The Secretary may provide for refunds to be made of amounts collected from producers on a pro rata basis taking into consideration the reduction in commercial marketings by the producer from the commercial marketings during the base period.

"(C) The funds remitted to the Corporation as a result of the deductions provided for under this paragraph that are not used in making refunds to producers shall be used to offset the cost of the milk price support program. Authority for making deductions under this paragraph shall not apply for any fiscal year for which the Secretary estimates that net price support purchases of milk or the products of milk would be less than 7.5 billion pounds milk equivalent. If at any time during a fiscal year the Secretary should establish that such net price support purchases during that fiscal year would be less than 7.5 billion pounds, the authority for requiring such deductions shall not apply for the balance of the year.

"(D) The Secretary may provide for refunds to producers on a periodic basis during the year. If, based on total marketings for the year, the Secretary should determine that an overpayment has been made to the producer for the year, the producer shall repay the amount of the overpayment.

"(E) Prior to approving any application for a refund, the Secretary shall require evidence that such reduction in marketings has taken place and that such reduction is a net decrease in marketings of milk and has not been offset by expansion of production in other production facilities in which the person has an interest or by transfer of partial interest in the production facility or by the taking of any other action which is a scheme or device to qualify for payment.

"(4) The funds represented by the deductions referred to in paragraphs (2) and (3) shall be remitted to the Commodity Credit Corporation at such time and such manner as prescribed by the Secretary by each person making payment to a producer for milk purchased from the producer, except that in the case of any producer who markets milk of the producer's own production directly to consumers, such funds shall be remitted to the Corporation by the producer. The funds represented by such reduction shall be considered as included in the payments to a producer of milk for purposes of the minimum price provisions of the Agricultural Adjustment Act of 1933, as reenacted and amended by the Agricultural Marketing Agreement Act of 1937.

* * *

APPENDIX E

Congressional Budget and Impoundment Control Act of 1974

[The full act is set forth at Title 2 U.S.C. Sec. 621 *et seq.* Its full cite is Pub. L. 93-344 88 Stat. 298. The following excerpt is the law's provision for legislative veto.]

EXERCISE OF RULEMAKING POWERS

Sec. 904. (a) The provisions of this title (except section 905) and of titles I, III, and IV and the provisions of sections 606, 701, 703, and 1017 are enacted by the Congress--

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

(b) Any provision of title III or IV may be waived or suspended in the Senate by a majority vote of the Members voting, a quorum being present, or by the unanimous consent of the Senate.

(c) Appeals in the Senate from the decisions of the Chair relating to any provision of title III or IV or section 1017 shall, except as otherwise provided therein, be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the resolution, concurrent resolution, reconciliation bill, or rescission bill, as the case may be.

APPENDIX F
7 U.S.C. 1446, 1446(b)

§ 1446. Price support levels for designated nonbasic agricultural commodities

The Secretary is authorized and directed to make available (without regard to the provisions of sections 1447 to 1449 of this title) price support to producers for tung nuts, soybeans, honey, milk, sugar beets, and sugarcane as follows:

(c) The price of milk shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. Such price support shall be provided through the purchase of milk and the products of milk. .

The above was in the section prior to and after the constitutional amendments. (96 Stat. 763 97 P.L. 253)

(d) See Appendix D for contested amendments (96 Stat. 763; 97 P.L. 253)

§ 1446b. Policy with regard to dairy products

The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general

welfare of the Nation; a dependable domestic source of supply of these foods in the form of high grade dairy herds and modern, sanitary dairy equipment is important to the national defense; and an economically sound dairy industry affects beneficially the economy of the country as a whole. It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy.

Aug. 28, 1954, c. 1041, Title II, § 204(a), 68 Stat. 899.

APPENDIX G

15 U.S.C. 7.13-11, 7:13A-12

§ 713a-11. Annual appropriations to reimburse Commodity Credit Corporation for net realized loss

There is authorized to be appropriated annually for each fiscal year, commencing with the fiscal year ending June 30, 1961, out of any money in the Treasury not otherwise appropriated, an amount sufficient to reimburse Commodity Credit Corporation for its net realized loss incurred during such fiscal year, as reflected in its accounts and shown in its report of its financial condition as of the close of such fiscal year. Reimbursement of net realized loss shall be with appropriated funds, as provided herein, rather than through the cancellation of notes.
Pub.L. 87-155, § 2, Aug. 17, 1961, 75 Stat. 391.

§ 713a-12. Deposit of net realized gain of Commodity Credit Corporation in Treasury.

In The event the accounts of the Commodity Credit Corporation reflect a net realized gain for any such fiscal year, the amount of such net realized gain shall be deposited in the Treasury by the Commodity Credit Corporation and shall be credited to miscellaneous receipts.

Pub.L. 87-155 § 3, Aug. 17, 1961, 75 Stat. 391.

APPENDIX H
Constitutional Excerpts

ARTICLE [I]

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Constitutional Amendments

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the the States respectively, or to the people.

APPENDIX I

Affidavit of Robert Sedgwick

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Edward R. Mulroy, d.b.a.
Mulroy Dairy Farms,
Plaintiff,

vs. 82-CV-1191

John R. Block, Secretary of
Agriculture of the United
States of America,
Defendant.

Affidavit in Support of Plaintiff's Motion for Summary Judgment in Opposition to The Defendant's Motion for Summary Judgment.

I, ROBERT C. SEDGWICK, of Dewitt, New York, first being duly sworn, deposes and says as follows:

1. I hold a Bachelors, Masters and PhD degree in Economics. I am retired from the Maxwell School of Citizenship and Public Affairs at Syracuse University, Syracuse, New York. My teaching and research has been in Economics, as well as in Industrial Organization. I have studied the dairy industry over a period of years. I am intimately familiar with the producer-handler industry having studied it at length in several geographical areas of the United States. I have performed price elasticity studies of consumer demand for milk.

2. Producer-handlers in general are a class of dairy farmers who produce, process, and distribute milk of their own production to the consuming public. They have never been the cause of surplus since they are closely associated with the demand for milk.

They have a strong economic incentive to keep their supply of milk and their demand for milk in balance. They do business solely at the retail level. They do not regularly engage in the wholesale marketing of raw milk. They receive no measurable benefits from the government price support program since they are not engaged in marketing at the wholesale level and are not engaged in producing manufactured milk products with which the Commodity Credit Corporation deals. Producer-handlers operations are almost exclusively in fresh fluid milk. They constitute approximately 1% of the milk market and their presence, or absence, in any regulatory program results in no measurable benefit or detriment to the program. Their commerce is insignificant and not substantial by any measure.

3. The price support program is so far removed from the retail price level where the producer-handler operates as to render the effect of the program, in terms of benefits, so negligible as to be immeasurable. The producer-handler is able to create his own demand by supplying fresh milk from a close local source of supply.

4. The effect of this deduction on Mr. Mulroy is similar to that which would be experienced by all producer-handlers in New York State, the Northeast as well as throughout the United States.

5. The business of producer-handlers is traditionally located within a relatively limited radius of their farms and is intrastate in nature.

6. Mr. Mulroy is typical of his class of producer-handers.

7. Under the Milk Market Order program, an entirely separate program of the Secretary of Agriculture, the Secretary fixes the minimum price required to be paid to producers for their milk. However, the producer-handler needs no such price protection since he is selling his own milk at the retail level. Furthermore, because they are so few in number and the volume of milk is so small, the Secretary has traditionally exempted them from the regulatory program. This has been confirmed by Congres-

sional action in a series of directives to the Secretary confirming the exemption of producer-handlers.

8. Mr. Mulroy is a member of a class of producer-handers living and producing in New York State that supply the fresh milk industry of New York State. Their business is local with their milk going to local consumers. These and other New York State producers are virtually the sole suppliers of fresh milk for the New York State consumer. These producers will be destroyed by the deduction placed on them by the Secretary. Those producers marketing fresh milk in other geographical locations throughout the United States will be similarly destroyed.

* * *

12. The deduction, as it is called in the Act, is an absolute appropriation of property by deduction from the sales price of the seller. The deduction, which is in effect a tax, appropriates capital of the producer. As such, it is by its nature confiscatory of capital. It is a levy without a requirement related to the value of the transaction or the ability to pay of the producer or the benefit conferred. This principal, once established in the law, would allow the Congress through the power to tax appropriate private property of any business for government purposes at will.

13. The deduction is also totally destructive of the right to engage in commerce as a producer of milk. It results in a producer return that is below its cost of production, as defined by Title 7 of the United States Code, § 1441(a), which requires a Secretary to include in determining costs of productions, a return from management and a return for an equity and labor for a one man farm.

14. Mr. Mulroy, all producer-handlers, and the vast majority of producers, are reduced well below this standard by the deduction levied by the Secretary.

15. This result follows because in general this capital intensive industry was greatly weakened prior to the imposition of this deduction by the rise in interest rates and by other adverse economic developments. As a result, the federal program was not realizing it's goals at the level established by the Congress at 7 USC 1441(a), 1446(b) and 1446(c) of assuring the national defense and interest would be protected and assuring farmers their cost of production. Therefore, the deduction assessed against an already weakened industry is destructive of that industry and totally at variance with the statutory objectives of supporting a viable industry.

16. For example, before the deduction the legislative hearing record reveals that the Federal Land Bank made a study of over 400 farms in their Northeast loaning region. This study is attached at Exhibit A. It shows 50% of the farmers were negative before the assessment and after the deduction of $1.00, 75% would have been negative. The legislative record further reveals statements indicating that the farmers could not stand a $1 (one dollar) reduction without suffering wholesale destruction and liquidation. Indeed, the House report indicates the same when it finds that a $1 (one dollar) reduction would result in a forced liquidation of thousands of farms.

17. Reaching the same conclusion is a study undertaken by the State of New York, and released in December 1982, entitled "Dairy Farm Management and Business Summary, New York 1981", page 36 of which is photostated and attached hereto. This shows that in 1981, prior to this deduction, dairy farmers in New York were unable to meet the statutory standards.

18. Therefore, it appears that Congress has established a program to assure the national defense and to protect consumers as well as producers, *but* one which as applied, was and now is not reaching its declared statutory income goals.

19. Under such circumstances the Secretary has no power to levy this deduction.

20. I am aware of a survey done within a month of 80 members of all sizes and types of dairy farms made by the Oneida Madison Cooperative Inc. The findings of this survey make it clear that virtually none of the producers located in this Central New York county will receive the statutory level of return after the deduction.

21. The above result is contrary to the professed goals of the support program which are to:

1. Assure an adequate supply of milk for national defense, health and general welfare, (7 USC 1446(c) and 1446(b)).

2. To maintain an economically sound industry (7USC 1446(b)).

3. Stabilize annual production (7 USC 1446(b)).

4. Stabilize the economy at a level which would give farmers a fair return for labor and investment when it is compared with what they buy. (7 USC 1446(b)).

5. Adjust for changes in cost of production (7 USC 1446(c)).

6. Assure a level of income adequate to maintain productive capacity sufficient to meet future needs (7 USC 1446(c)).

22. I oppose this deduction because it is in economic effect a tax upon capital destructive to such a degree as to foreclose most dairy farmers in the Northeast and the United States and to bring them well below the statutory standard of the support price. A terrible mistake has been made on a scale unknown in my lifetime as an economist.

23. The ripple effect will be felt economically in real estate taxes and by schools, suppliers, consumers, farmer bankruptcies, beef, corn and industrial output. The loss to be incurred by society is far greater than the revenue involved.

24. The accumulation of CCC inventory occurred because of political pricing instead of market pricing which saw the CCC offer to buy at higher than market prices. The result was that normal private inventories were moved through the Commodity Credit Corporation and became budget items. These items are not surplus in the normal sense.

S/ Robert C. Sedgwick
ROBERT C. SEDGWICK

Sworn to before me this 29th
day of December, 1982.
Alice E. Stirling
Notary Public

APPENDIX J
Affidavit of Fallert for Government

* * *

14. It is true that producer-handlers almost never make sales of milk over State lines. However, any increased sales of milk by producer-handlers would displace an equivalent amount of milk that would be sold by other handlers. The milk which is ultimately displaced will wind up as Commodity Credit Corporation (CCC) purchases in times of excess milk supplies, such as that which exists at present.

15. The Federal Dairy Price Support Program was designed to, and does, support the price of all milk produced in the United States. Purchases of manufactured dairy products increase the price paid for manufacturing grade milk. These increases are automatically reflected in all prices under Federal Milk Marketing orders which, in turn, determine the competitive prices of unregulated milk, including prices that producer-handlers will likely charge consumers. Between 1979 and 1981, prices received by New york producer-handlers rose the equivalent of $3.25/cwt., compared with a rise of $1.90 for producers selling at wholesale. These producer-handlers evidently benefitted at least as much as other dairymen from the rapidly escalating support price level.

* * *

S/ Richard F. Fallert
RICHARD F. FALLERT

Executed and Signed on the 7th
day of January, 1983.

APPENDIX K

Excerpts from Reply Affidavit of Robert Sedgwick

* * *

6. There is no evidence presented in the Fallert affidavit to support the generalized conclusion

> ". . . any increase sale of milk by producer-handlers would displace an equivalent amount of milk that would be sold by other handlers. The milk which is ultimately displaced will wind up as Consumer Credit Corporation purchases. . ." (P. 14).

The dynamics of supply and demand in each of the local and regional milk markets make such a generalization highly questionable in the absence of statistical proof. I know of no such data.

7. The Fallert affidavit declares that

> " between 1979 and 1981, prices received by New York producer-handlers rose the equivalent of $3.25 per cwt., compared with the rise of $1.90 per producer selling at wholesale." (P. 15).

No evidence is presented to support these figures, and no recognition is apparently made of the retailing services performed by producer-handers. The cost of retailing services incurred by producer-handlers have been escalating and these costs likewise are reflected in prices received.

* * *

10. To prevent unnecessary repetition, I repeat and reallege the matters previously in my affidavit in full.

S/ Robert Sedgwick
ROBERT SEDWICK

No. 84-616

In the Supreme Court of the United States

OCTOBER TERM, 1984

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,
PETITIONER

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that amendments to the dairy price support program effected by the Omnibus Budget Reconciliation Act of 1982 (the 1982 Budget Act), Pub. L. No. 97-253, 96 Stat. 763 *et seq.*, establish an unlawful delegation of taxing authority to the Secretary of Agriculture, result in confiscation of private property and were beyond the power of Congress to regulate interstate commerce. In addition, petitioner apparently claims that the dairy price support provisions of the 1982 Budget Act were passed in violation of congressional rules or that those rules were waived in a manner that offends separation of powers and that the Secretary has misinterpreted the Act.

1. a. Pursuant to Section 201(c) of the Agricultural Act of 1949, 7 U.S.C. 1446(c), the Secretary of Agriculture assures an adequate supply of milk by supporting the price

of milk. Price support is achieved by having the Commodity Credit Corporation, a corporate arm of the Department of Agriculture, purchase unlimited quantities of surplus milk products at preestablished prices. In 1982, Congress became alarmed at the immense annual cost of the dairy price support program (over $2.3 billion in 1982) and the large quantities of milk apparently being produced simply for sale to the government. Accordingly, in the 1982 Budget Act, Congress adopted significant reforms of the dairy price support program. Congress established a minimum support price for milk and granted the Secretary authority to institute a program of deductions applicable to the proceeds of sale of all milk marketed commercially by producers in the United States. The Secretary was authorized to impose these deductions only if government purchases of surplus milk products were expected to reach specified levels in a given year. 7 U.S.C. 1446(d).

In September 1982, the Secretary determined that government purchases of surplus milk products would more than double the trigger level set by the 1982 Budget Act. The Secretary therefore instituted the authorized deduction program. 47 Fed. Reg. 53831 (1982). Following litigation in the United States District Court for the District of South Carolina, see *South Carolina* v. *Block*, 717 F.2d 874 (4th Cir. 1983), cert. denied, No. 83-1215 (Mar. 5, 1984), the deduction program went into effect in April 1983. 48 Fed. Reg. 11253. That program remained in effect until December 1983, when it was superseded by Title I of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128 *et seq.* In the 1983 Act Congress made the deduction program mandatory, and provided that nothing in the new Act should "affect in any manner the collection or enforcement of any deduction from the price of milk previously implemented by the Secretary" (§ 102(a), 97 Stat. 1129).

b. Petitioner is a dairy farmer in New York who produces and processes milk, which he sells locally without a middleman (Pet. App. A9). He brought this action in the United States District Court for the Northern District of New York asserting that the Secretary's milk deduction program was unconstitutional and contrary to statute in numerous respects (see, *e.g.* Pet. App. A13-A14 (listing contentions)). In May 1983, the district court rejected petitioner's constitutional contentions and several of his statutory claims (Pet. App. A9-A27). In November 1983, the district court rejected petitioner's remaining claims, which raised administrative law issues, and granted summary judgment to the government (Pet. App. A6-A8).

The court of appeals affirmed (Pet. App. A1-A3) on the basis of the district court's two opinions, citing as well the "thorough opinion" (Pet. App. A3) of the United States Court of Appeals for the Fourth Circuit in *South Carolina* v. *Block, supra,* which had upheld the milk deduction program against constitutional and administrative law attack, and *Mandel* v. *Block,* 573 F. Supp. 1522 (S.D.N.Y. 1983).

2. The decision of the court of appeals is clearly correct and does not conflict with any decision of this Court or any other court. Review by this Court is plainly unwarranted.

a. Petitioner contends (Pet. 11-12) initially that the 1982 revisions of the dairy price support program impermissibly gave effect to an invalid legislative veto. Petitioner's contention apparently is based on Congress's decision, in enacting the 1982 Budget Act, to waive its internal procedural rules, set out in the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 *et seq.* The latter Act, however, clearly indicates that its procedural provisions represent an exercise of Congress's rulemaking powers. See Congressional Budget and Impoundment Control Act of 1974 § 904(a)(1), 2 U.S.C. 621 note. Thus,

these rules for governing legislative procedures are subject to change, waiver, or suspension at the pleasure of Congress. See Congressional Budget and Impoundment Control Act of 1974 § 904(a)(2), 2 U.S.C. 621 note. In this instance, Congress waived the applicable procedures. Because Congress merely waived its own internal rules, which need not be established by legislation enacted in conformity with the bicameralism requirement and Presentment Clauses of Article I, Section 7 of the Constitution, *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), is wholly inapposite here. See *id.* slip op. 35 n.20.[1]

b. Petitioner contends (Pet. 12) that he has standing to argue that the 1982 Budget Act was not passed according to proper congressional procedures. Because the underlying claim (discussed above) has no merit, there is no reason to consider any standing issue. Moreover, petitioner's contention is barred by the "enrolled act rule." See *Field* v. *Clark*, 143 U.S. 649, 673 (1892); *Rainey* v. *United States*, 232 U.S. 310, 317 (1914).

c. Petitioner also asserts (Pet. 13-14) that the 1982 milk deduction program was an unconstitutionally "confiscatory" or otherwise invalid tax. Petitioner's argument ignores the fact that the milk deduction program merely reduced the federal subsidy that kept milk prices set at an artificially high level, benefiting all milk producers. This Court has held that assessment programs serving a regulatory purpose similar to the milk deduction program are not to be regarded as tax provisions, and they accordingly are not

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[1]The milk price support program modifications established by the 1982 Budget Act have been superseded by subsequent legislation. See page 2, *supra*. The 1983 legislative revision of the milk price support program would appear to ratify the deduction program established under the 1982 Budget Act. In any event, the procedures by which the 1982 program was established do not, in the circumstances, present any question of continuing importance.

subject to any constitutional restraints on taxing authority. See *Head Money Cases*, 112 U.S. 580 (1884); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897); *Millard* v. *Roberts*, 202 U.S. 429 (1906). The courts of appeals have uniformly rejected arguments such as those raised by petitioner, *Rodgers* v. *United States*, 138 F.2d 992, 994 (6th Cir. 1943); *Morrison Milling Co.* v. *Freeman*, 365 F.2d 525 (D.C. Cir. 1966), cert. denied, 385 U.S. 1024 (1967); *Nabisco Inc.* v. *United States*, 599 F.2d 415, 422 n.2 (Ct. Cl. 1979), and the Fourth Circuit rejected precisely the arguments renewed here in *South Carolina* v. *Block*, *supra*.

Petitioner's reliance (Pet. 14) on *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), and *FPC* v. *New England Power Co.*, 415 U.S. 345 (1974), is misplaced. In those cases, the Court held that a licensing fee or its equivalent imposed pursuant to the Independent Offices Appropriation Act, 1952, 31 U.S.C. 9701, must be commensurate with the value of the benefit received from the government by the party paying the fee. The milk deduction program, however, does not involve license fees exacted for the privilege of entering a particular activity and does not rest on the Independent Offices Appropriation Act; rather, the milk deduction program simply adjusted the level of the existing price supports that benefit all milk producers by means of a charge keyed to the volume of milk sold. The primary purpose of the milk deduction is regulatory (*South Carolina* v. *Block*, 717 F.2d at 887); it is not a revenue-raising measure in the guise of a license fee.

d. Petitioner next contends (Pet. 15-17) that his activities are outside the scope of Congress's authority to regulate commerce. This contention is insubstantial because petitioner engages in a class of activity that significantly affects interstate commerce. See *Wickard* v. *Filburn*, 317 U.S. 111, 127-128 (1942); *Perez* v. *United States*, 402 U.S. 146, 154 (1971); *Katzenbach* v. *McClung*, 379 U.S. 294, 301

(1964); *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 568-569 (1939). Petitioner argues, however, that he is part of a small and commercially unimportant sub-class of milk producers, producer-handlers. But that sub-class accounts for roughly 1% of milk sales nationally (see Pet. App. A9), an amount equal to millions of dollars of sales, and thus accounts for a substantial share of the annual cost of the federal milk price support program (see page 2, *supra*). Accordingly, even petitioner's small sub-class has a substantial impact on interstate commerce. And it is irrelevant that petitioner himself may not sell any of his production to the Commodity Credit Corporation; he competes with these who do so, and receives a price from his customers supported by the milk price support program. See Pet. App. A19, A21; *Wickard* v. *Filburn*, 317 U.S. at 128.

e. Finally, petitioner alleges (Pet. 17-19) that the Secretary's deduction program rested on a misinterpretation of the 1982 Budget Act's milk price support provisions. Petitioner's contention is insubstantial. See *South Carolina* v. *Block*, 717 F.2d at 882-884; *Mandel* v. *Block*, 573 F. Supp. at 1526-1528; *National Farmers' Organization, Inc.* v. *Block*, 561 F. Supp. 1201, 1208 (E.D. Wisc. 1983). In any event, petitioner's contention is unavailing because Congress ratified the actions taken by the Secretary under the 1982 Budget Act when it mandated a deduction program in December 1983. See page 2, *supra;* H.R. Rep. 98-237, 98th Cong., 1st Sess. 18 (1983) ("[T]he Committee is of the view that the actions of the Secretary were in accordance with the law.").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12

IN THE

Supreme Court of the United States

No. 84-616

October Term, 1984

EDWARD R. MULROY, d/b/a MULROY DAIRY FARMS,

Petitioner,

-vs.-

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Petitioner, in reply to the Government's Memorandum in Opposition, directs the Court's attention to the following:

1. The answering Memorandum admits that the contested capital assessment was passed in violation of the substantive and procedural requirements of the Congressional Budget and Impoundment Act of 1974 (see Opposition Memorandum at page 3, number 2), by the exercise of a retained congressional power to cancel that law at will, commonly called a "legislative veto". The reason advanced for the legality of the "veto" is that the matter

involves internal congressional substantive and procedural matter and thus is exempt from the rule announced in *INS v. Chadha* 103 S.Ct. 2764. (See Opposing Memorandum, page 4). *Chadha* (supra) however, recognized that internal powers of Congress become externalized and lose their internal character when other branches of government cojoin with Congress in legislation. All congressional powers originate as internal powers. They become external and binding when they become law. In this regard *Chadha* (supra) held: "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked[19]".

That interpretation has since been faithfully followed in *Consumer Energy Council of America v. FERC* 673 F 2d 425 D.C.Cir. 1982; *American Federation of Government Employees of AFL-CIO et al. v. Pierce* 647 F 2d 300 D.C.Cir. 1983; see also *Kennedy v. Sampson* 511 F 2d 430 D.C.Cir. 1979.

The Opposing Memorandum claims that the legislative veto was cured by subsequent enactment legislation i.e. 1983 Dairy and Tobacco Adjustment Act, containing a validation clause. That is in error in two respects. First, there is a savings of monies collected clause, not validation, and second, the 1983 Act was likewise passed by exercise of a legislative veto and is being contested on that ground in the District Court of the District of Columbia, (*Kreeger Farms v. Block et al.*).

Certiorari is thus needed to conform this case to the *Chadha* (supra) decision.

2. The Petitioner has standing to sue against a legislative veto as a directly affected person as well. *INS v. Chadha* (supra) directly so held at page 2776. All other circuits considering the question have also so held. (See Petition, page 12). Certiorari should issue on this point to enforce prior decisions of this Court and to so conform the rule in the Second Circuit.

The "enrolled bill doctrine" relied on by the Opposition Memorandum as a further ground to deny the petitioner's standing to enquire into the exercise of the legislative veto, evolved in

the middle and late 1800's. It does not appear to have been applied by any Court in over fifty years. During that time the whole law of standing has evolved. It is plain that without explicit reference to the doctrine, that doctrine has been impliedly overruled in the course of the evolution of standing, *Vander Jagt v. O'Neill* 699 F 2d 1166, 1170 (D. of Col. Cir.); see page 1 infra). Even when the "enrolled bill doctrine" was followed it had engrafted in to it an exception not followed in this case by the Lower Court . This allowed a suit by a directly affected private citizen. (See *United States v. Ballin* 144 US 1, 5).

Certiorari should therefore issue to apply that exception to this case and to clarify the applicability in the present legal world of the "enrolled bill doctrine".

4. The Government's Memorandum in support of its burden of proof to show jurisdiction to regulate intra state commerce (*United States v. Bass* 404 US 3363) urges the following facts upon this Court: (1) "all" producers were benefited by the program, (Memorandum, pages 4 & 5); (2) Petitioner's milk prices at retail for pasteurized products were supported by the wholesale program for raw milk producers, (Memorandum, page 6) and (3) that a substantial impact upon interstate commerce is made by the Petitioner's class volume of 1%, (Memorandum, page 6).

The Petitioner's expert emphatically denied the above assertions, and stated that the petitioner's class was not benefited; nor did it have any adverse impact on the program.[1] That expert specifically denied any retail price benefit to the Petitioner.[2]

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[1] Petitioner's Appendix pages 36-41, 43.

[2] "The Price Support Program is so far removed from the retail price level, where the producer-handler operates, as to render the effect of the program in terms of benefits so negligible as to be immeasurable. The producer-handler is able to create his own demand by supplying fresh milk from a close local source of supply. "
(Petition, appendix page 37) (see also page A43).

This occurs because the government price support is aimed at the price paid farmers who sold raw milk to milk processors, a level that has no economic relevance to the Petitioner's class who only sold pasteurized milk at retail to the public.

Not even the Government expert contended the 1% of commerce of the Plaintiff's class was any part of the problem. He assumed that commerce and was only concerned with an increase.

Thus, there was a square issue of fact before the Lower Court should it decide to credit those assertions, and no assertion of one claim made here on impact.

That the fact issues were genuine and material is obvious.

It is well established by this Court that on a Summary Judgment motion, the District Courtt cannot weigh the credibility of evidence (*Agosto v. Immigration and Naturalization Service*, 436 US 748, 98 S.Ct. 2081). Nor may evidence be weighed by the District Court, (*Cox v. American Fidelity Casualty Co.* 1947 CA 9th 249 F 2d 616; *Storen v. American National Bank and Trust Co.* (1976) CA 7 Illinois 529 F 2d 1257). Summary Judgment cannot be granted on an issue where reasonable men could differ, *United States v. Diebold, Inc.* 369 US 654, 82 S.Ct. 993.

Since the Petitioner attacked the constitutionality of the statute on its face, and also as applied, and genuine issues of fact existed, certiorari should issue in the interests of justice and to conform the Second Circuit to the settled law of this Court and other circuits on Summary Judgment.

5. The cases of *National Cable Television Ass'n. v. United States* 415 US 336, (1974), *FPC v. New England Power Co.* 415 US 345 (1974), *National Cable Television Ass'n. v. FCC* 554 F 2d 1094 Dist. of Col. Cir. (1976) involved an exercise of the commerce power to regulate CATV and Electrical Power in aid of which an assessment to fund the cost of that commerce regulatory program was levied. The Court said, if the fee exceeds benefit conferred, it becomes a tax.

These cases indicate the commerce power cannot be called on to avoid the constitutional limitations of the taxing power and thus to read these limitations out of the Constitution.

Stated differently, *the test is the effect of the levy, not the power called on,* as was stated by this Court in *United States v. Ptasynski* 103 S.Ct. 2239, 2242.

To date, some Lower Courts have been led in an opposite direction by a holding in *Rodgers v. United States* 138 F 2d 992 (6th Cir. 1943) to the contrary. There that circuit relying on the *Head Money* cases (112 US 580)[1] held that the sole test for the nature of an assessment is the mental purpose and/or stated purpose of Congress, i.e. revenue or regulation.

Other Courts have been led in the opposite direction to the Cable T.V. and power cases (supra) by *Wickard v. Filburn* 317 US 111, an early 1940 decision, made in an agricultural setting, in which there was no indication that there are any constitutional tax restrictions on penalties levied under the commerce power. The issue of an excise tax was not raised or discussed therein, but the decision has cast a long shadow.

Thus, at the present time, if one is an owner of a Cable T.V. station, or a stockholder of an electrical utility, one can claim the constitutional restraints of the taxing power against commercial assessments of a tax like nature. However, if one is a farmer, one does not have the privilege of these constitutional protections.

It is respectfully submitted no Court, other than this Court, can reach and settle these questions of the constitutional interrelationship of these powers.

This is a proper case to reach the issues. It presents the outer most bounds to date of the assertion of such a power by Congress.

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[1] The Government Memorandum likewise relies upon the *Head Money* cases as does *Rodgers* (supra). The later case of *Pollack v. Farmers Loan Trust Company,* 158 US 601 appears to have abandoned the *Head Money* rationale, so that *Rodgers* (supra) is now seriously out of date.

It is clear, beyond any question, that the assessment, which is levied upon the act of sale, and whose monies are used to fund the program, is in fact an excise tax, as such taxes have been defined by this Court - in *Knowlton v. Moore* 178 US 41, 88, i.e. "burdens with reference to the art of manufacturing them or selling them," and as they were known to the Constitutional Convention.

Here the levy is on account of a sale at retail in intrastate commerce. The bill is entitled Budget. The problem to be resolved was revenue to pay for the growing expense of the program. The money was in fact used to offset Treasury outlay. Not one commerce finding was made in the overall program or in the assessment legislation.

There is no question that it is a direct levy operating to fund a general public interest program, in which cheese is given away, and free school lunches provided, and the foreign policy of the United States pursued, all pursuant to express congressional findings, of national defense and general welfare all funded by this levy which is levied upon one segment of the public only.

Resolution of the constitutional issue will determine the legality of the assessment since the act delegated to the Secretary a non-delegable function i.e. the decision to tax or not tax.[4]

Accordingly, certiorari is necessary to clarify and fix the proper role of the Constitution in this process.

All points heretofore urged are repeated.

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[4] The delegation is made upon the finding of certain levels of production. There are *no* standards on the actual exercise of the power; see the *Cable T.V. and Power Case* (supra).

Respectfully submitted,

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